

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ATTIA, ET AL, ) CV-17-6037-BLF  
                  )  
                  PLAINTIFF, ) SAN JOSE, CALIFORNIA  
                  )  
                  VS. ) FEBRUARY 14, 2019  
                  )  
GOOGLE, LLC, ET AL, ) PAGES 1-22  
                  )  
                  DEFENDANT. )  
                  )  
                  )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE BETH LABSON FREEMAN  
UNITED STATES DISTRICT JUDGE

## A P P E A R A N C E S

FOR THE PLAINTIFF: **BY: ERIC WILLIAM BUETHER**  
BUETHER JOE & CARPENTER, LLC  
1700 PACIFIC AVENUE, SUITE 4750  
DALLAS, TX 75201

FOR THE DEFENDANT: **BY: CHARLES TAIT GRAVES**  
JOSHUA BASKIN  
SHELBY TSAI  
WILSON SONSINI GOODRICH & ROSATI  
ONE MARKET STREET  
SPEAR TOWER, SUITE 3300  
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APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PRODUCED WITH COMPUTER

1                   APPEARANCES CONTINUED:

2                   FOR THE PLAINTIFF:

3                   **BY: JAMES WES CHRISTIAN**

4                   CHRISTIAN SMITH AND JEWELL LLP  
5                   2302 FANNIN STREET, SUITE 500  
6                   HOUSTON, TX 77002

7                   FOR THE DEFENDANT:

8                   **BY: JOSHUA LOUIS RAYES**

9                   **ROBERT JOHN KENT**

10                  TURNER BOYD LLP  
11                  702 MARSHALL STREET, SUITE 640  
12                  REDWOOD CITY, CA 94063

1 SAN JOSE, CALIFORNIA

FEBRUARY 14, 2019

2 P R O C E E D I N G S

3 (COURT CONVENED AT 9:48 A.M.)

4 THE CLERK: CALLING CASE 17-6037. ATTIA, ET AL  
5 VERSUS GOOGLE, ET AL.

6 COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

7 MR. GRAVES: GOOD MORNING, YOUR HONOR.

8 CHARLES GRAVES FOR THE GOOGLE DEFENDANTS, AND WITH ME IS  
9 SHELBY TSAI.

10 THE COURT: HELLO, MR. GRAVES.

11 MR. CHRISTIAN: GOOD MORNING, YOUR HONOR.

12 WES CHRISTIAN FOR THE PLAINTIFF, WITH MY COLLEAGUE  
13 ERIC BUETHER.

14 THE COURT: MR. CHRISTIAN, GOOD MORNING.

15 MR. KENT: AND YOUR HONOR, ROBERT KENT OF TURNER BOYD  
16 FOR FLUX AND FLUX DEFENDANTS. I HAVE WITH ME JOSH RAYES, ALSO  
17 FROM TURNER BOYD.

18 THE COURT: GOOD MORNING. ALL RIGHT.

19 WELL, WE'VE BEEN HERE BEFORE. AND LET ME JUST GIVE YOU MY  
20 THOUGHTS. I DON'T THINK THERE WILL BE ANY SURPRISE HERE.

21 I'M NOT PERSUADED, MR. CHRISTIAN, THAT I SHOULD CHANGE --  
22 I'M SORRY -- YEAH, MR. CHRISTIAN, SORRY, YOU ARE STANDING ON  
23 THE WRONG SIDE.

24 MR. CHRISTIAN: WELL, IT'S A LITTLE MISLEADING, JUST  
25 FOR THE RECORD, BOB BLAKEY WAS GOING TO BE HERE, BUT I'M

1 SUB'ING FOR HIM, AND OBVIOUSLY I'M NOT THE AUTHOR OF THE  
2 FEDERAL RICO STATUTES.

3 THE COURT: PLEASE, LET MR. BLAKEY KNOW THAT I WAS  
4 LOOKING FORWARD TO SEEING HIM AGAIN AND ENGAGING IN THAT  
5 DISCUSSION THAT I THINK WE WERE QUITE RUSHED ON LAST TIME.

6 MR. CHRISTIAN: HE'S NOT WELL, UNFORTUNATELY.

7 THE COURT: OH, I'M SORRY. I'M SORRY. AND HE LIVES  
8 IN THE MIDWEST, I THINK.

9 MR. CHRISTIAN: HE LIVES IN PHOENIX, ARIZONA.

10 THE COURT: ALL RIGHT. WELL, HE'S NOT SUFFERING THE  
11 COLD WEATHER THEN.

12 I JUST DON'T THINK THAT STANDING HAS BEEN ESTABLISHED  
13 UNDER RICO. AND THIS VERY DIFFICULT ISSUE OF THE  
14 EXTINGUISHMENT OF THE ALLEGED TRADE SECRETS BY THE FILING AND  
15 PUBLICATION OF THE PATENT APPLICATION IS -- IT'S A TROUBLING  
16 SET OF ALLEGATIONS. THERE'S NO QUESTION IN MY MIND.

17 AND AS I SAID IN MY PRIOR ORDER, I THINK THAT YOUR  
18 CLIENT'S RIGHTS ARE, IN FACT, COMPLETELY PROTECTED UNDER STATE,  
19 THE UNIFORM TRADE SECRETS ACT, WHICH HAS BEEN ALLEGED.

20 AND MUCH TO MR. GRAVE'S DISAPPOINTMENT, I AM GOING TO  
21 DECLINE SUPPLEMENTAL JURISDICTION AND NOT RULE ON THE STATE  
22 CLAIMS.

23 AND THE REASON FOR THAT, ASSUMING THAT I HOLD ON TO MY  
24 TENTATIVE HERE, IS THAT THIS CASE HAD A LONG HISTORY IN STATE  
25 COURT. IT'S MY UNDERSTANDING THAT THE STATE TRADE SECRET

1 CLAIMS SURVIVED DEMURRER IN STATE COURT.

2 WHEN YOUR CLIENT CHOSE TO FILE THE FEDERAL CLAIMS AND  
3 GOOGLE REMOVED THE CASE, IT OF COURSE CAME TO ME. AND ALTHOUGH  
4 I HAVE FULL AUTHORITY TO RULE ON THE STATE CLAIMS IF I CHOSE  
5 TO, I REALLY THINK THIS CASE ALWAYS BELONGED IN STATE COURT.  
6 IT SHOULD NEVER -- THESE AMENDMENTS SHOULD NEVER HAVE BEEN  
7 MADE, BECAUSE I THINK THEY JUST DON'T REALLY GET US TO WHERE  
8 YOU WANT TO BE.

9 AND I'M GOING TO LET THIS CASE RETURN TO STATE COURT AND  
10 LET -- I THINK YOU HAD JUDGE KIRWAN BEFORE?

11 MR. CHRISTIAN: YES, WE DID.

12 THE COURT: AND HE'S NOT HANDLING COMPLEX ANYMORE, SO  
13 MAYBE JUDGE WALSH WILL TAKE A FRESH LOOK AND DEAL WITH IT  
14 DIFFERENTLY. BUT AT THIS POINT, I'M NOT GOING TO DRIVE A STAKE  
15 THROUGH THE HEART OF THE CASE, ONLY THROUGH THESE NEW CLAIMS.

16 SO I'M GLAD TO HEAR FROM YOU FURTHER ON THE RICO AND THE  
17 DEFEND TRADE SECRETS ACT CLAIMS, THEY REALLY GO HAND IN HAND.  
18 IF THE EXTINGUISHMENT HAD BEEN AFTER 2016, OF COURSE I WOULD  
19 LOOK AT THIS DIFFERENTLY. IT'S THIS EXTINGUISHMENT IN 2012  
20 WHEN THE PUBLICATION OCCURRED. AND YOU'VE NOW CLARIFIED THE  
21 ALLEGED TRADE SECRET, IT'S COMPLETELY PARALLEL IN THE PUBLISHED  
22 PATENTS.

23 MR. CHRISTIAN: WE HAVE.

24 THE COURT: AND SO I HAVE NO DOUBT THAT ALL OF THE  
25 ALLEGED TRADE SECRETS WERE EXTINGUISHED. YOU ALLEGE THEY WERE

1 EXTINGUISHED. YOU ACKNOWLEDGE THAT BECAUSE OF THE PUBLICATION.

2 AND SO I THINK THAT THEN DEFEATS YOUR USE ARGUMENT,  
3 BECAUSE I CERTAINLY AGREE WITH YOU, THE CONTINUED USE UNDER THE  
4 FEDERAL STATUTE CAN BE A VIOLATION. BUT YOU CAN'T -- THERE'S  
5 NO LONGER USE OF A TRADE SECRET, THERE'S USE OF MAYBE, I MEAN,  
6 THERE MAY STILL BE WRONGDOING, BUT IT'S NOT A TRADE SECRET USE.

7 SO THAT'S WHERE I COME OUT. I DON'T THINK YOU HAVE THE  
8 PREDICATE ACTS BECAUSE THERE'S NO RETROACTIVITY OF RICO, AND I  
9 DON'T THINK YOU CAN MAKE OUT THE DTSA CLAIM, AND THAT'S  
10 D-T-S-A.

11 MR. CHRISTIAN: ALL RIGHT. SO I WOULD STILL LIKE TO  
12 MAKE A PROFFER.

13 THE COURT: I WOULD LIKE THAT, YES, THANK YOU.

14 MR. CHRISTIAN: AS USUAL, YOU ARE VERY ASTUTE, YOU  
15 CAUGHT ON TO OUR NEW CONCEPT WHICH IS REALLY ABOUT USE.

16 AND WE ARE -- TO BE CLEAR WITH THE COURT, WE ARE  
17 SEPARATING USE FROM THE ULTIMATE ACQUISITION AND DISCLOSURE.  
18 TO ME, YOU CAN TAKE SOMETHING, BUT THAT'S DIFFERENT THAN USING  
19 IT. NOW, I WOULD ADMIT THAT MOST THE TIME WHEN YOU TAKE IT,  
20 YOU ARE GOING TO USE IT, BUT THE STATUTE DIFFERENTIATES, IT  
21 SAYS "OR," NOT "AND." OKAY. "OR USE."

22 AND SO WHAT I THOUGHT WAS INSTRUCTIVE, FRANKLY, WAS THE  
23 123 EXTERIORS CASE WHICH CAME OUT ACTUALLY AFTER THE AVAGO  
24 CASE, IT CAME OUT AUGUST 1ST, 2018. NOW GRANTED, SO WE DON'T  
25 MISLEAD THE COURT, THAT'S AN EASTERN DISTRICT OF PENNSYLVANIA

1 CASE.

2 THE COURT: I NOTED THAT.

3 MR. CHRISTIAN: BUT AT LEAST I THINK THAT'S A GOOD  
4 COURT AND GOOD DISTRICT, FRANKLY, HAVING PRACTICED THERE  
5 BEFORE.

6 THE COURT: BUT THAT WAS DISCLOSURE TO A THIRD PARTY,  
7 NOT EXTINGUISHMENT OF THE TRADE SECRET, WASN'T IT?

8 MR. CHRISTIAN: NO, IN THAT CASE -- LET'S JUST READ  
9 FROM THAT CASE REAL QUICK BECAUSE I DON'T WANT TO MISLEAD  
10 ANYTHING. AND I'M GOING TO READ FROM A SMALL EXCERPT. AND  
11 AGAIN, THIS IS ALL IN OUR BRIEF, SO THERE'S NO NEW CASES HERE.

12 THIS IS PAGE 6 OF THE CASE, FOOTNOTE 6 UNDER THE TITLE,  
13 COUNT 1, THEFT OF TRADE SECRETS. THE DTSA DEFENSE  
14 MISAPPROPRIATION IS THE ACQUISITION OF A TRADE SECRET OF  
15 ANOTHER PERSON WHO KNOWS OR HAS REASON TO KNOW THAT THE TRADE  
16 SECRET WAS ACQUIRED BY IMPROPER MEANS OR DISCLOSURE. IT HAS  
17 BEEN WIDELY INTERPRETED TO REACH A DEFENDANT'S CONTINUED USE OF  
18 TRADE SECRETS AFTER THE ENACTMENT, EVEN IF THE SECRETS WERE  
19 ACQUIRED EARLIER."

20 OKAY.

21 THE COURT: THE SECRETS ACQUIRED EARLIER.

22 MR. CHRISTIAN: RIGHT.

23 WELL, OKAY, BUT I'M GOING TO SUBMIT TO THE COURT THAT THAT  
24 FALLS UNDER THE EQUITABLE ESTOPPEL ISSUE, AND THEN WE ARE GOING  
25 TO TALK THEN ABOUT THE RELIGIOUS TECH CASE, WHICH IS A CASE OUT

1 OF THIS NORTHERN DISTRICT, WHICH WE CITED. AGAIN, ALL OF THIS  
2 WAS CITED IN OUR PAPERS, AND THEN WE ARE GOING TO TALK ALSO  
3 ABOUT THE UNDERWATER STORAGE CASE WHICH IS AN OLDER CASE, 1966  
4 CASE, DISTRICT OF COLUMBIA, BECAUSE I THINK YOU HAVE TO LOOK AT  
5 IT TWO WAYS.

6 I WILL CONFESS TO THE COURT THAT BOTH OF THOSE ELEMENTS,  
7 YOU KNOW, TO SOME EXTENT ARE NECESSARY, BECAUSE IN ORDER TO  
8 SEPARATE THE USE FROM THE ACQUISITION, BECAUSE CLEARLY THE  
9 ACQUISITION OCCURRED, CLEARLY IT GOT CONVERTED INTO A PATENT,  
10 ALTHOUGH WE HAD PUT IN OUR COMPLAINT THAT THAT WAS FRAUDULENTLY  
11 DONE, INDUCED TO DO SO UNDER CONSIDERATION, THAT WAS NEVER  
12 PAID. YOU ACKNOWLEDGE THAT IN THE ORDER --

13 THE COURT: WELL, AND I THINK YOU MAY STILL HAVE  
14 REMEDIES. MR. GRAVES HAS POINTED OUT WHERE THAT MIGHT NOT BE  
15 SUCCESSFUL. BUT I'M NOT GOING TO RULE ON IT.

16 BUT I CERTAINLY -- IF THERE'S A VALID CONTRACT ACTION AND  
17 YOUR CLIENT SHOULD HAVE BEEN PAID, THEN YOU CAN STILL LITIGATE  
18 THAT, MAYBE. I MEAN, YOU KNOW, IT'S UP TO ANOTHER JUDGE TO  
19 MAKE THAT DECISION.

20 MR. CHRISTIAN: AND I AGREE WITH THAT. EXCEPT OUR  
21 POSITION IS WE HAVE DEMONSTRATED, AS THE COURT REQUESTED US TO  
22 DO, THREE OR FOUR INSTANCES OF USE, POST MAY 2016.

23 AND IF WE CAN ALSO DEMONSTRATE THAT THEY, THE GOOGLE  
24 DEFENDANTS, FLUX, ET CETERA, CANNOT HIDE BEHIND A SHIELD, THAT  
25 THEY FRAUDULENTLY INDUCED SOMEBODY WITH INTO CREATING, OKAY,

1 THEN ULTIMATELY, I THINK WE GET THERE UNDER FEDERAL RICO ON THE  
2 STANDING ISSUE.

3 THE COURT: YOU ARE CREATING A BACKDOOR TO  
4 RETROACTIVITY, IS REALLY THE PROBLEM HERE. AND I'M NOT WITH  
5 YOU ON THAT THEORY. THAT'S THE PROBLEM THAT I SEE WITH IT.

6 AND WITH THE EQUITABLE ESTOPPEL, THERE CLEARLY ARE OTHER  
7 REMEDIES FOR THE WRONGDOING THAT YOU ALLEGE.

8 MR. CHRISTIAN: AND I THINK THE COURT PROPERLY STATED  
9 THAT IN YOUR JUNE ORDER. BUT MY COUNTER TO THAT, FRANKLY  
10 YOUR HONOR, IS THIS, IS THAT ONCE SOMETHING IS CHARACTERIZED  
11 RIGHT OR WRONG, EITHER THEY ARE HIDING BEHIND A SHIELD THAT  
12 THEY FRAUDULENTLY CREATED THAT STEMMED OUT OF A THEFT, OR THEY  
13 DIDN'T.

14 IF THEY DID, WHICH IS WHAT WE ALLEGE, OKAY, THEN THEY  
15 SHOULDN'T BE ABLE TO TAKE THE POSITION THAT, LOOK, YOU CAN USE  
16 IT FOR A STATE LAW TRADE SECRETS CLAIM, BUT YOU CAN'T USE IT  
17 FOR PREDICATE ACT OR RICO.

18 RESPECTFULLY, THAT MAKES NO SENSE TO ME.

19 THE COURT: STATE LAW DOESN'T HAVE THIS SHARP DATE IN  
20 2016 AND A NONRETROACTIVITY. IT'S JUST AN UNUSUAL  
21 CIRCUMSTANCE, IT'S A PROBLEM THAT WILL END PRETTY SOON. WE ARE  
22 GOING TO GET OVER THAT HURDLE, AND THESE FEW CASES THAT GOT  
23 CAUGHT ON THE RETROACTIVITY WILL BE AN INTERESTING FOOTNOTE TO  
24 HISTORY.

25 MR. CHRISTIAN: ALL RIGHT. SO AT THE END OF THE DAY,

1           WHAT I HEAR THE COURT SAYING IS YOU SIMPLY DON'T THINK USE  
2           STANDS ALONE. YOU THINK USE REVERTS BACK TO THE ACQUISITION,  
3           AND RESPECTFULLY, THAT'S NOT OUR POSITION.

4           THE COURT: I THINK IT HAS TO BE USE OF A TRADE  
5           SECRET.

6           MR. CHRISTIAN: RIGHT.

7           THE COURT: AND THERE'S NO TRADE SECRET AFTER 2012.

8           MR. CHRISTIAN: AND THE COURT BELIEVES THAT EVEN  
9           THOUGH, AS WE PLED THAT THEY WRONGFULLY MISCHARACTERIZED IT AND  
10          DUPED OUR CLIENT INTO RE-CHARACTERIZING IT IN A PATENT.

11          THE COURT: SO UNFORTUNATELY, AT LEAST MY VIEW OF IT  
12          IS ALL THAT YOU ALLEGE, AND I WILL ACCEPT THE PLEADINGS ON  
13          THE -- THAT YOUR CLIENT WAS DUPED, BUT HE WAS -- HE SIGNED THE  
14          CO-INVENTOR DECLARATION. AND ALL HE WAS DUPED INTO IS  
15          BELIEVING HE WOULD BE PAID. AND HE CAN STILL PURSUE A CLAIM TO  
16          BE PAID.

17          SO IT WASN'T -- HE'S NOT ACTUALLY ALLEGING THAT HE  
18          EXPECTED THESE TRADE SECRETS TO ALWAYS REMAIN TRADE SECRETS.  
19          AND SOME INVENTORS ACTUALLY CHOOSE, YOU KNOW THAT, TO ONLY WORK  
20          IN THE TRADE SECRET AND PROTECT IT AND NOT FILE PATENTS.

21          SO HE KNEW WHAT A PATENT WAS, HE'S A VERY SOPHISTICATED  
22          MAN, AND HE KNEW THAT THERE WOULD BE PUBLICATION, SO HE WAS  
23          RIGHTLY OR WRONGLY EXPECTING SIGNIFICANT MONETARY PAYMENT FOR  
24          HIS OWN INVENTIONS.

25          MR. CHRISTIAN: TRUE.

1           BUT DON'T YOU AGREE, YOUR HONOR, THAT BASED ON OUR PLEAS,  
2           AT LEAST WHICH THE COURT OBVIOUSLY HAS TO ASSUME IS TRUE, THAT  
3           WE PLED THAT THERE WERE MATERIAL OMISSIONS OF FACT.

4           WE DON'T DISPUTE THAT HE'S A CO-AUTHOR ON THE PATENT. WE  
5           DON'T DISPUTE THAT THE PATENT WAS PUBLISHED AND ISSUED, WE  
6           DON'T DISPUTE ANY OF THE FACTS YOU JUST RECITED.

7           BUT WHAT WE DO SAY IS YOU CAN'T JUST LOOK AT THAT IN AN  
8           ISOLATED SHELL, YOU HAVE TO LOOK AT IT IN THE CONTEXT OF THE  
9           MATERIAL OMISSIONS THAT WERE LEFT OUT. AND WHERE THAT GETS YOU  
10          IS HE WOULD HAVE NEVER AGREED TO THE PATENT IF HE KNEW THAT  
11          THEY WERE GOING TO DO WHAT THEY ARE DOING NOW, WHICH IS STEAL  
12          IT AND USE IT AND BLOCK HIM OUT. DOES THAT MAKE SENSE?

13           MR. BUETHER: YOUR HONOR, I COULD ADDRESS THAT  
14          BECAUSE THAT DOES TOUCH A LITTLE BIT ON THE STATE TRADE SECRET  
15          CLAIM.

16           IT'S ANALOGOUS TO -- THERE ARE SEVERAL ANALOGIES. ONE  
17          WOULD BE WHEN I GO RENT THE CAR, YOU GIVE ME THE CAR, I SIGN AN  
18          AGREEMENT TO PAY YOU FOR THE CAR, I HAVE TO RETURN IT IN THREE  
19          DAYS. I TAKE IT AND DRIVE TO NEW YORK CITY AND HANG OUT IN  
20          BROOKLYN, YOU KNOW, AND SAY, OH, YOU WANT TO GET PAID, YOU  
21          KNOW, I DIDN'T STEAL YOUR CAR, I JUST EXTENDED, BY MY OWN  
22          UNILATERAL ACTION, MY USE OF THE CAR.

23           NO, THAT'S AUTOMOBILE THEFT. YOU WOULD GO TO PRISON FOR  
24          DOING THAT BECAUSE YOU'VE STOLEN THE CAR UNDER FALSE PRETENSES.

25           WHAT WE ALLEGE HERE IS THAT THE ASSIGNMENTS AND THE

1 AGREEMENTS THAT MR. ATTIA SIGNED WERE CONDITIONAL, JUST LIKE AN  
2 ASSIGNMENT OF A PATENT CAN BE CONDITIONAL LIKE THE WATERMAN  
3 CASE THAT, YOU LOAN ME MONEY, I ASSIGN YOU THE PATENT, BUT YOU  
4 AGREE TO PAY FOR THE PATENT, THE MONEY THAT -- THE  
5 CONSIDERATION, AND YOU JUST BLOW IT OFF, YOU JUST RENEGE ON  
6 THAT.

7 IF THE ASSIGNMENT IS CONDITIONAL AND THE TITLE REVERTS  
8 BACK OR THERE'S THE ASSIGNMENT WAS CONDITIONAL, THAT IS THEFT,  
9 THAT IS NOT MERELY A BREACH OF CONTRACT, BECAUSE YOU HAVE TWO  
10 DIFFERENT INTERESTS GOING HERE. ONE IS ENFORCEMENT OF  
11 PROMISES, CLEARLY THAT'S NOT AT ISSUE --

12 THE COURT: AND THE THEFT OF THE TRADE SECRET TOOK  
13 PLACE IN 2011 AND 2012 AT THE LATEST WHEN THE PUBLICATION  
14 OCCURRED.

15 MR. BUETHER: WE BELIEVE THAT ONCE THE -- THE  
16 OBLIGATION TO COMPENSATE MR. ATTIA WAS TRIGGERED IN JUNE OF  
17 2011 OR THIRTY DAYS AFTER THAT, WHENEVER HE SIGNED THOSE. AND  
18 SO GOOGLE WAS IN DEFAULT OF THAT OBLIGATION WHILE THE PATENT  
19 APPLICATION WAS STILL CONFIDENTIAL.

20 THE REAL WRONGDOING WAS IF THEY WANT TO RENEGE AND SAY,  
21 YOU KNOW WHAT, I DON'T REALLY WANT TO USE YOUR TRADE SECRETS,  
22 YOU CAN HAVE THEM BACK AND WE WILL TEAR UP THIS STUFF AND WE  
23 WILL JUST GO ON SEPARATELY. BUT INSTEAD, THEY DID TWO BAD  
24 THINGS, THEY KEPT THE CAR AND DIDN'T PAY FOR THE CAR, THEY JUST  
25 TOOK IT.

1                   THE COURT: BUT I THINK THAT YOUR THEORY IS A --  
2  
3                   THERE'S A BETTER THEORY UNDER -- I MEAN, YOU COULD EVEN HAVE A  
4  
5                   CONVERSION CLAIM AND HAVE THESE PATENTS ASSIGNED TO MR. ATTIA  
6  
7                   OR TO HIS COMPANY.

8  
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SO I'M IN THE SITUATION WHERE I'M NOT BLOCKING ANY FORM OF  
REMEDY OR THE OPPORTUNITY FOR IT, BUT, YOU KNOW, THIS WHOLE  
RICO THING, I HAVE GREAT RESPECT FOR MR. BLAKEY, AND AS I SAID,  
I WOULD HAVE ENJOYED ENGAGING WITH HIM AGAIN, BUT I'M PRETTY  
SURE THAT WHEN HE WROTE THAT STATUTE, THIS ISN'T WHAT HE WAS  
THINKING ABOUT, THINKING ABOUT ORGANIZED CRIME.

MR. CHRISTIAN: I WOULDN'T KNOW THE ANSWER TO THAT,  
YOUR HONOR.

THE COURT: MR. GRAVES?

MR. GRAVES: YEAH. I WANT TO MAKE A COUPLE OF POINTS  
TO THE DTSA, AND THEN I WANT TO SPEAK ABOUT SUPPLEMENTAL  
JURISDICTION, BECAUSE I THINK THERE'S SOMETHING YOU JUST SAID  
THAT WILL IS REALLY IMPORTANT, AND I WANT TO TALK THROUGH THAT  
ISSUE.

SO ON THE DTSA, THE HASBRO CASE, NOT THE 123 EXTERIORS  
CASE, WHICH YOU ARE RIGHT, WAS ONLY ABOUT AN UNPUBLISHED  
DISCLOSURE, THE HASBRO CASE IN THE DISTRICT OF RHODE ISLAND IN  
NOVEMBER, FOLLOWED YOUR HOLDING FROM LAST SUMMER, IN A CASE  
MUCH LIKE THIS ONE WHERE PATENT APPLICATIONS AND OTHER THINGS  
LEAD TO THE PUBLICATION OF THE ALLEGED TRADE SECRETS BEFORE MAY  
OF 2016 BY THE DEFENDANT.

1                   WHAT THAT MEANS IS THAT ALL THREE COURTS TO HAVE TOUCHED  
2                   ON THIS ISSUE, AVAGO, YOUR ORDER LAST SUMMER, AND NOW THE  
3                   DISTRICT OF RHODE ISLAND, HAVE ALL AGREED THAT THERE IS NO DTSA  
4                   CLAIM WHEN THERE IS PRIOR PUBLICATION AND EXTINGUISHMENT OF THE  
5                   ALLEGED SECRETS.

6                   THE EQUITABLE POINT IS REALLY SIMPLE, EQUITY DOESN'T MAKE  
7                   STATUTES RETROACTIVE. CONGRESS MADE A DECISION. AND WE ALL  
8                   KNOW AT ANY MOMENT IN TIME, YOUR HONOR, THAT THERE ARE LARGE  
9                   NUMBERS OF TRADE SECRET DISPUTES SWIRLING AROUND.

10                  AND SO IN MAY OF 2016, THERE WERE PROBABLY HUNDREDS, IF  
11                  NOT THOUSANDS OF TRADE SECRET DISPUTES AROUND THE COUNTRY  
12                  GELLING AND COMING UP. AND CONGRESS MADE A CONSIDERED CHOICE  
13                  NOT TO MAKE THE STATUTE RETROACTIVE.

14                  WHAT THAT LITERALLY MEANS, WITH THAT BULK OF CASES OUT  
15                  THERE, IS THAT SOME WINNING CASES AND SOME LOSING CASES AND  
16                  SOME IN-BETWEEN CASES ARE ALL HELD TO BE NONRETROACTIVE. SO  
17                  THE STRENGTH OR THE MERITS OR THE LACK THEREOF ARE REALLY  
18                  IRRELEVANT TO WHETHER CONGRESS' DECISION IS HELD TO.

19                  AND I'M UNAWARE OF ANY THEORY THAT WOULD MAKE EQUITABLE  
20                  DOCTRINES OR TORT DOCTRINES OR ANYTHING LIKE THAT ABLE TO  
21                  OVERCOME CONGRESS' DECISION ON RETROACTIVITY. SO I THINK YOU  
22                  ARE RIGHT ABOUT THAT.

23                  YOU MENTIONED A MOMENT AGO THAT YOU THOUGHT THAT THERE  
24                  MIGHT BE A REMAINING CLAIM FOR RIGHT TO BE PAID. AND I THINK  
25                  THERE'S SOMETHING REALLY IMPORTANT ABOUT SUPPLEMENTAL

1 JURISDICTION HERE.

2 FIRST, LET'S REMEMBER THAT THERE'S TWO DIFFERENT STATE LAW  
3 CAUSES OF ACTION. ONE IS A DTSA CLAIM, AS YOUR HONOR NOTED,  
4 ONE IS A CONTRACT CLAIM, WHICH SAYS UNDER THIS CONTRACT, WE  
5 WERE SUPPOSED TO BE PAID SOMETHING, PAID MONEY.

6 LET'S BE VERY CAREFUL TO SEPARATE THOSE TWO THINGS.  
7 BECAUSE A BREACH OF CONTRACT CLAIM THAT SAYS I'M DUE A MONEY  
8 PAYMENT BECAUSE I ALLEGE THAT SOMEBODY USED SOMETHING OR DID  
9 SOMETHING, WOULD BE IRRELEVANT TO THE TRADE SECRET CLAIM.  
10 THOSE ARE TWO DIFFERENT THINGS.

11 EVEN IF THE CONTRACT CLAIM HAD MERIT, AND IT DOESN'T, BUT  
12 EVEN IF IT DID, THAT WOULDN'T UNDUE THESE PATENTS, IT WOULDN'T  
13 UNDUE GOOGLE'S ABILITY TO PUBLISH THOSE PATENTS THROUGH THE  
14 PTO, AS YOU MENTIONED. AND IT WOULDN'T CREATE TRADE SECRETS  
15 WHERE THEY HAVE BEEN ASSIGNED TO GOOGLE WITH ALL RIGHTS TITLE  
16 AND INTEREST.

17 I THINK IT WOULD BE A MISTAKE IF THE NINTH CIRCUIT WERE TO  
18 HEAR A PIECemeAL APPEAL ON DTSA AND RICO THAT IT DIDN'T NEED TO  
19 REACH IF THE STATE LAW UTSA CLAIM FAILED IN FRONT OF IT.

20 AND THERE'S SOMETHING REALLY IMPORTANT ABOUT WHY THAT  
21 CLAIM FAILS, WHICH GOES TO THE DEFENSE OF THE PATENT SYSTEM.  
22 THE PATENT SYSTEM, YOUR HONOR, REQUIRES FOR EVERY CO-INVENTOR,  
23 TWO THINGS. A DECLARATION, AND AN ASSIGNMENT UNDER THE CFO'S.

24 THOSE ARE ALL ATTACHED HERE. THE PATENT SYSTEM DOES THAT  
25 FOR A GOOD REASON, THAT RECORDATION OF TITLE PROVIDES

1 PREDICTABILITY AND CERTAINTY SO PATENTS CAN BE LICENSED, SOLD  
2 AND LITIGATED WITHOUT THERE BEING SOME OTHER CLAIMANT LURKING  
3 OUT THERE. THAT CERTAINTY AND THAT PREDICTABILITY IS A PUBLIC  
4 GOOD.

5 AND IN A SITUATION WHERE MR. ATTIA AGREED IN A CONTRACT  
6 THAT IF GOOGLE FILED PATENT APPLICATIONS ON ANY PATENTS, HE  
7 WOULD RECEIVE A PATENT LICENSE, AND HE'S NOT STANDING HERE  
8 CLAIMING THAT HE DIDN'T GET THAT LICENSE OR HE DIDN'T GET WHAT  
9 HE WANTED. I DON'T SEE ANY WAY FOR THE TRADE SECRET CLAIM TO  
10 GO FORWARD, I'M TALKING ABOUT THE STATE LAW CLAIM, I THINK IT  
11 OUGHT TO BE BUNDLED INTO THE SAME APPEAL BECAUSE IT COMES AS A  
12 PRECEDENT BEFORE IT EVEN REACHED DTSA. AND IT REALLY HAS  
13 NOTHING TO DO WITH THIS CLAIM FOR MONEY. I CAN TELL YOU WHY I  
14 THINK THAT IS WRONG TOO, BUT THAT'S A SEPARATE ISSUE.

15 AS YOU NOTED, MR. ATTIA EXPECTED NOT ONLY THAT THESE WOULD  
16 BE PUBLISHED, BUT HE WOULD SEE THE CONSIDERATION HE BARGAINED  
17 FOR ON THE FACE OF THE COMPLAINT. HE HAS NOT FILED A CAUSE OF  
18 ACTION SAYING, YOU GOOGLE, DID NOT GIVE ME A PATENT LICENSE.  
19 HE'S SAYING THERE IS ANOTHER SECTION OF THE CONTRACT AND I  
20 BREACHED THAT AND YOU GIVE ME SOME MONEY FOR THAT. BUT THAT'S  
21 UTTERLY INDEPENDENT OF HIS PATENT ASSIGNMENTS TO US.

22 AND I WOULD BE WORRIED IF WE WERE SENT BACK TO STATE COURT  
23 AND HAD TO TALK TO JUDGE WALSH OR JUDGE KIRWAN ABOUT PATENT  
24 DECLARATIONS AND THINGS LIKE THAT. THIS IS ABOUT THE CLARITY  
25 OF TITLE --

1                   THE COURT: THIS IS INTERESTING THOUGH BECAUSE CLAIMS  
2 FOR PATENT OWNERSHIP ARE STATE COURT CLAIMS. SO IN FACT,  
3 THEY'RE NOT FEDERAL CLAIMS.

4                   MR. GRAVES: I DON'T BELIEVE IT'S A FEDERAL QUESTION  
5 EITHER. AND I THOUGHT REALLY HARD ABOUT IT. AND HERE'S WHY,  
6 IF YOU LOOK BACK AT THE AVTEC CASE, THE FOURTH CIRCUIT CASE,  
7 THE ONE THAT SAYS YOU HAVE A RIGHT TO PUBLISH, THAT DEFEATS THE  
8 CONFLICTING TRADE SECRECY, THEY DIDN'T BASE THAT ON FEDERALISM  
9 OR COPYRIGHT PREEMPTION, IT'S JUST THE IDEA THAT YOU HAVE A  
10 RIGHT TO PUBLISH.

11                  BUT MY POINT TO YOU IS WE'VE GOT PATENT ASSIGNMENTS THAT  
12 ARE CLEAR AS A BELL, WE'VE GOT A CONTRACT THAT SPECIFICALLY  
13 GIVES HIM CONSIDERATION FOR THOSE PATENTS, WHICH IT'S NOT MORE  
14 THAN, THAT'S WHAT HE ASKED FOR HE AND HIS FAMILY GET A PERSONAL  
15 LICENSE TO USE THEM IN THEIR PERSONAL PRACTICE.

16                  THAT'S THE TRADE SECRET CASE. THE CONTRACT CASE SAYS PAY  
17 ME MONEY, AND THAT'S WHAT MR. CHRISTIAN, WITH ALL DUE RESPECT,  
18 WAS TALKING ABOUT. SO WHY SHOULD THE NINTH CIRCUIT NOT HEAR A  
19 VERY SIMPLE TRADE SECRET CASE WHERE SOMEBODY --

20                  THE COURT: WELL, I WILL JUST TELL YOU THAT EVEN IF I  
21 WERE TO DETERMINE THAT YOUR ARGUMENTS ARE VERY STRONG, I'M NOT  
22 LIKELY TO CLOSE DOWN THE CASE AT THE PLEADING STAGE. AND ON  
23 ISSUES LIKE THIS, I GENERALLY WOULD DEFER TO A MORE DEVELOPED  
24 RECORD AND SUMMARY JUDGEMENT.

25                  SO THAT'S JUST NOT, I DON'T THINK THAT WILL HELP. AND SO

1       THIS CASE WAS REMOVED, AND SO I WILL REMAND. AND I DON'T  
2       ACTUALLY KNOW THE SCOPE OF THE APPELLATE RIGHTS UNDER THAT  
3       CIRCUMSTANCE, THAT'S FOR THE NINTH CIRCUIT AND YOU TO DECIDE  
4       AND NOT ME, AS TO WHEN AND WHERE THAT APPEAL IS RIPE.

5           BUT DON'T -- I'M NOT -- AS I SAY, I THINK YOUR ARGUMENTS  
6       ARE VERY PERSUASIVE, MR. GRAVES, ON THOSE OTHER CLAIMS. I  
7       RECOGNIZE THAT JUDGE KIRWAN SAW IT DIFFERENTLY UNDER STATE  
8       PLEADING REQUIREMENTS, AND I'M VERY RESPECTFUL OF THAT. I  
9       THINK THIS CASE SHOULD HAVE STAYED IN STATE COURT, YOU WOULD  
10      HAVE BEEN DONE BY NOW.

11           SO, YOU KNOW, I THINK THESE ISSUES OF LAW ON RICO AND DTSA  
12      ARE REALLY GOOD ISSUES FOR THE NINTH CIRCUIT TO REVIEW. I  
13      DON'T THINK THAT THE STATE LAW PORTION OF IT IS NECESSARY FOR  
14      WHAT I'VE DONE, I'VE CERTAINLY NOT ANALYZED THE STATE LAW  
15      CLAIMS. AND I DON'T KNOW WHEN YOU CAN GET TO THE NINTH CIRCUIT  
16      ON THAT. BUT YOU WILL MAKE YOUR DECISIONS ON IT.

17           I WILL ALSO SAY, BECAUSE I THINK YOU KNOW HOW I'M GOING TO  
18      RULE, THIS DISPUTE HAS BEEN GOING ON FOR A LONG TIME, AND IT  
19      SEEMS TO ME THAT AS COMPLICATED AS THE THEORIES OF LIABILITY  
20      ARE, THE UNIVERSE OF REMEDIES IS LESS COMPLICATED. AND IT  
21      SEEMS TO ME THAT THE PARTIES SHOULD ENGAGE IN SERIOUS MEDIATION  
22      AND TRY TO RESOLVE THIS BEFORE YOU JUST CONTINUE WITH MORE  
23      YEARS OF LITIGATION.

24           AND SO I DON'T KNOW WHETHER YOU'VE TRIED THAT BEFORE,  
25      MAYBE HAVE YOU.

1 MR. BUETHER: WE DID ONCE, YES.

2 THE COURT: AND MAYBE YOU KNOW A LOT MORE ABOUT THE  
3 CASE, MAYBE HAVING THE RICO CLAIMS MOVED TO THIS NEXT LEVEL  
4 WHERE THEY ARE REALLY OFF THE TABLE IN DISTRICT COURT, MAYBE  
5 THAT WILL ASSIST IN LOOKING AT THESE REMEDIES.

6 BUT, YOU KNOW, MR. ATTIA IS NOT A YOUNG MAN, AS I RECALL,  
7 AND SO IT MAY BE IN HIS INTEREST TO REENGAGE IN MEDICATION.

8 DID YOU USE A PRIVATE MEDIATOR?

9 MR. BUETHER: WE DID, A FORMER JUDGE, AND I CAN'T  
10 REMEMBER HIS NAME OFF THE TOP OF MY HEAD. HE'S IN  
11 SAN FRANCISCO. I CAN SEE HIS FACE.

12 BUT YEAH, WE DID, AND, YOU KNOW, WE AGREE WITH YOU, THIS  
13 HAS BEEN AROUND A LONG TIME, AND ESPECIALLY FOR THE ATTIA'S,  
14 WHO ARE GETTING QUITE OLD, THEY WANT TO SEE A CLOSURE, I GUESS  
15 YOU WOULD CALL IT, BEFORE IT'S TOO LATE.

16 THE COURT: ABSOLUTELY.

17 MR. BUETHER: SO YOU HAVE A VERY STRONG POINT ON IT.

18 THE COURT: IF YOU WANT TO REENGAGE WITH THE MEDIATOR  
19 YOU USED BEFORE OR NOT, I DON'T MAKE ANYONE DO ANYTHING. AND  
20 AS SOON AS MY ORDER GOES OUT, I WILL BE REMANDING IT AND HAVE  
21 NO OTHER CONTROL OVER THE CASE. AND ALTHOUGH -- I MEAN, IN A  
22 SENSE, WHAT I HAVE TO DO NOW IS NOT ANYWHERE NEAR AS MUCH WORK  
23 AS IT WAS THE FIRST TIME BECAUSE I'M JUST GOING TO STAY  
24 CONSISTENT WITH THE ORDER, EVALUATE THE MODIFICATION AND THE  
25 PLEADINGS AND BE ABLE TO MAKE THAT RULING.

1 SO I CERTAINLY ENCOURAGE THE PARTIES TO JUST -- AND YOU  
2 ARE ALL HERE, MAYBE YOU CAN DISCUSS THAT IN THE HALLWAY AS TO  
3 WHETHER THAT MAKES SENSE OR NOT. OBVIOUSLY YOUR CLIENTS HAVE  
4 TO BE WILLING TO ENTER MEDIATION IN GOOD FAITH FOR IT TO MAKE  
5 ANY --

6 MR. GRAVES: YOUR HONOR, WE DID TRY BEFORE WITH  
7 JUDGE READ AMBLER.

8 THE COURT: OH, JUDGE AMBLER.

9 MR. GRAVES: BUT THE CASE IS RUN BY A LITIGATION  
10 FUNDING ENTITY, AND IT'S IMPORTANT TO KNOW THAT. IT'S PART OF  
11 DYNAMIC HERE.

12 THE COURT: I SEE.

13 MR. BUETHER: WELL, SINCE WE GOT INTO THAT, AND I  
14 WILL KEEP IT BRIEF, I DO BELIEVE AN IMPEDIMENT TO SETTLEMENT  
15 HAS BEEN, AND I'M NOT CASTING ANY FAULT HERE AT ALL, SOME VERY  
16 HARD FEELINGS BETWEEN THE COMPANY WAS CALLED MAX SOUND THAT  
17 ACQUIRED THE RIGHT TO CONTROL THE LITIGATION BY FUNDING IT, AND  
18 GOOGLE.

19 THERE WAS SOME OTHER LITIGATION BETWEEN THOSE TWO PARTIES,  
20 PATENT LITIGATION UNRELATED TO THIS, AND THEN THIS DISPUTE  
21 GOING OUT AT THE SAME TIME, AND THERE WERE SOME VERY HARD  
22 FEELINGS BETWEEN BOTH SIDES.

23 MAX SOUND IS NO LONGER FUNDING THIS CASE. SO IF THAT  
24 MAKES GOOGLE FEEL ANY BETTER, HE IS OUT OF THAT PROCESS.

25 THE COURT: IS SOMEONE ELSE FUNDING THE CASE?

1 MR. BUETHER: YES, YOUR HONOR.

2 I MEAN, ORDINARILY I DON'T GET INTO THIS ON THE RECORD,  
3 BUT IT IS NOT A BIG DEAL.

4 MR. CHRISTIAN: WELL, AS WE ARE SITTING HERE TODAY,  
5 WE HAVE BEEN FUNDING IT.

6 MR. BUETHER: PERSONALLY, I HAVE BEEN FUNDING IT AS  
7 WELL AS MR. CHRISTIAN. ANYWAY, SO I THINK THAT MAY HAVE BEEN  
8 AN IMPEDIMENT, IT STILL COULD BE A LINGERING IMPEDIMENT. BUT  
9 IT STILL IS CERTAINLY, HOPEFULLY WITH THAT CHANGE, MAYBE  
10 SOMETHING COULD BE DONE THAT COULDN'T GO --

11 THE COURT: IT'S ALWAYS INTERESTING. AND LET'S GO  
12 OFF-THE-RECORD FOR A SECOND.

13 (OFF-THE-RECORD DISCUSSION.)

14 THE COURT: THANK YOU. AS I SAY, I'M NOT MAKING ANY  
15 ORDERS ON THAT, I JUST ALWAYS LIKE TO ENCOURAGE IT WHERE IT  
16 SEEMS TO BE CRYING OUT.

17 MR. BUETHER: WELL, WISDOM FROM THE BENCH IS ALWAYS  
18 GOOD TO GET.

19 THE COURT: FREE ADVICE, ANYWAY.

20 MR. CHRISTIAN: THANK YOU, YOUR HONOR. PLEASURE TO  
21 BE HERE THIS MORNING.

22 MR. GRAVES: THANK YOU, YOUR HONOR.

23 (THE PROCEEDINGS WERE CONCLUDED AT 10:17 A.M.)

24

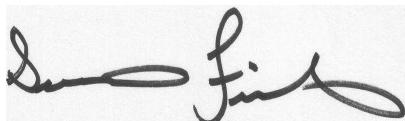
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**CERTIFICATE OF REPORTER**  
4  
5  
6  
7

8           I, THE UNDERSIGNED OFFICIAL COURT  
9           REPORTER OF THE UNITED STATES DISTRICT COURT FOR  
10          THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH  
11          FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
12          CERTIFY:

13           THAT THE FOREGOING TRANSCRIPT,  
14          CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND  
15          CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS  
16          SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
17          HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
18          TRANSCRIPTION TO THE BEST OF MY ABILITY.

19  
20  
21  
22  
23  
24



25          SUMMER A. FISHER, CSR, CRR  
              CERTIFICATE NUMBER 13185

DATED: 2/26/19